



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Professional Construction Services, Inc.
File: B-225691, B-226177
Date: April 16, 1987

DIGEST

1. Protest that sealed bids rather than negotiated procedures should have been used to procure a diffuser system is dismissed as untimely when not filed prior to the closing date for the receipt of proposals.
2. Protesters and other interested parties are not entitled to documents related to a protested procurement action that would give one or more parties a competitive advantage or - which parties are not otherwise authorized by law to receive.
3. Protest that technical evaluation was incorrect is dismissed where, even if protester is correct, record shows that protester was not prejudiced by the improper evaluation.

DECISION

Professional Construction Services, Inc. (PCS), protests the cancellation of invitation for bids (IFB) No. NSTL13-250-171, issued for a diffuser system by Pan Am World Services, Inc., a prime contractor for the National Aeronautics & Space Administration (NASA) at the National Space Technologies Laboratories (NSTL). PCS also protests the resolicitation of this requirement as a negotiated procurement under request for proposals (RFP) No. NSTL13-250-186.

We dismiss the protest.^{1/}

^{1/} Preliminarily, NASA argues that our Office does not have jurisdiction to decide this protest because the solicitation involves a subcontract award that is not "by or for" the government, a point that PCS disputes. See 4 C.F.R. § 21.3(f)(10) (1986). We find it unnecessary to decide the jurisdiction issue since we are dismissing the protest.

038663

Pan Am is a facility support services contractor at NSTL. As part of its contract performance Pan Am is required to modify the B-1 test position so that the test stand on which it is located can accommodate single engine testing of the Space Shuttle Main Engine. To meet this requirement, Pan Am is issuing seven solicitations for contractors to perform different aspects of the renovation. The current protest involves a solicitation to fabricate and install a diffuser, which will permit the testing to be accomplished under simulated altitude flight conditions.

Pan Am initially issued IFB-171 to procure the diffuser system and received three bids, including a bid from PCS. Pan Am canceled the solicitation, however, because all three bids exceeded Pan Am's cost estimate, as well as the funding available for this part of the project. Subsequently, Pan Am reevaluated and revised its cost estimate, modified the specifications to permit less costly construction, and issued RFP-186. NASA reports that Pan Am decided to resolicit for the diffuser system using a negotiated procurement so that further cost reduction measures could be discussed with the offerors.

Pan Am received offers under RFP-186 from the same offerors that had responded to IFB-171. Pan Am evaluated the proposals, held discussions, and requested best and final offers (BAFO's). PCS proposed the lowest cost, but also received the lowest technical score, 53.75, compared to 90 received by the awardee and 75.25 received by the third offeror. PCS' low technical score was due in part to Pan Am's finding that the first tier subcontractor proposed by PCS was unacceptable because the subcontractor intended to perform outdoors, had an inadequate physical plant, and had insufficient equipment.

PCS filed its protest with our Office by letter dated January 30 and received here on February 2. PCS alleged that Pan Am did not have a compelling reason to cancel the IFB, as required by the Federal Acquisition Regulation (FAR), and that it was improper for Pan Am to issue the resolicitation as a negotiated procurement because none of the circumstances in the FAR which permit negotiation existed. After receiving NASA's administrative report on the protest, PCS raised the following additional objections to the procurement: (1) Pan Am failed to provide the protester with all technical evaluation-related information supplied to our Office with the administrative report and requested by PCS pursuant to the Freedom of Information Act (FOIA); (2) Pan Am improperly awarded the contract while the protest was pending; (3) Pan Am is failing to enforce the permits and responsibilities

clause located at FAR, 48 C.F.R. § 52.236-7 (1986); and (4) Pan Am improperly determined that the subcontractor proposed by PCS was unacceptable.

In NASA's administrative report, the agency specifically disagreed that Pan Am's decision to cancel IFB-171 was improper, and PCS offered no rebuttal in its reply to the report. We therefore consider this issue abandoned and we will not consider it on the merits. Spectrum Analysis & Frequency Engineering, Inc., B-222554, Aug. 1, 1986, 86-2 C.P.D. ¶ 136.

Nor will we consider PCS' protest that Pan Am was required to use sealed bid rather than negotiated procedures to procure the diffuser system. As this allegation concerns an impropriety apparent from the face of the solicitation, to be timely it had to be filed with our Office or the procuring agency prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(a)(1). A protest is filed for purposes of our timeliness rules when it is received in our Office, notwithstanding when it was mailed. Yale Materials Handling Corp.--Reconsideration, B-223180.2, June 12, 1986, 86-1 C.P.D. ¶ 548. Also, a protest against an apparent defect that is submitted with a proposal is not considered timely. Precision Dynamics Corp., B-207823, July 9, 1982, 82-2 C.P.D. ¶ 35. PCS submitted its protest to Pan Am with its proposal on January 30, the due date for proposals, and we did not receive the protest until February 2. Consequently, PCS did not file a timely protest with the agency or our Office, and this basis of PCS protest is dismissed.

PCS protests that it has not been furnished all the technical evaluation documents contained in the administrative report. However, under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. III 1985), protesters and other interested parties are not entitled to documents related to a protested procurement action that would give one or more parties a competitive advantage or which parties are not otherwise authorized by law to receive. Insofar as PCS protests that Pan Am awarded the contract while PCS' protest was pending, a contract may be awarded notwithstanding the filing of a protest if the head of the agency finds that urgent and compelling circumstances that significantly affect the interests of the United States will not permit the agency to wait for our decision. 31 U.S.C. § 3553(c) (Supp. III 1985). Where the agency determines to award a contract while a protest is pending, the agency's obligation is to inform our Office. Simulators Limited, Inc.--Reconsideration, B-219804.2, Jan. 23, 1986, 86-1 C.P.D. ¶ 76. Here, Pan Am

found that urgent and compelling circumstances dictated that the award should be made before the protest was resolved. NASA approved that decision and informed our Office that the contract would be awarded. We have no legal basis to object to the award in such circumstances.

PCS also protests that Pan Am is not enforcing FAR, 48 C.F.R. § 52.236-7, which requires a contractor to have all necessary state and local licenses, because Utility Steel, the awardee, does not possess a certificate of responsibility required by Mississippi State Law. We first note that the cited regulation is required to be inserted in federal contracts for fixed-price construction or fixed-price dismantling, demolition or removal of improvements, and thus is not applicable to the present solicitation, for a diffuser system. Further, Utility Steel's compliance with Mississippi's state and local licensing requirements is a matter to be settled by Mississippi and Utility Steel, not this Office. Central Forwarding, Inc., B-222531.4, Aug. 4, 1986, 86-2 C.P.D.

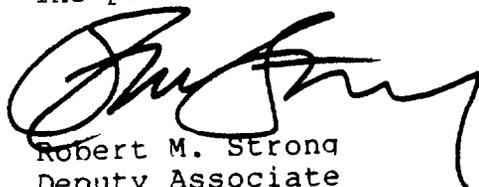
¶ 142.

Finally, PCS disputes Pan Am's finding that the first tier subcontractor proposed by PCS is unacceptable. PCS asserts that the subcontractor only intends to perform 20 percent of the contract outdoors, that the subcontractor has adequate indoor facilities to perform the other 80 percent of the contract, and that the subcontractor has or can lease suitable equipment. The protester also contends that its subcontractor has previously performed satisfactory work for Pan Am and NASA. PCS further complains that it was not told until February 5, the day BAFO's were due, that its subcontractor was unacceptable, and PCS therefore was denied the opportunity to propose a different subcontractor.

Before we will sustain a protest alleging that a proposal was improperly evaluated, the protester must demonstrate that it was prejudiced by the evaluation. See Cosmos Engineers, Inc., B-220000.3, Feb. 24, 1986, 86-1 C.P.D. ¶ 186. In the present case, five evaluators individually scored each technical proposal and the scores were then averaged for a composite score. The composite scores were 90 for the awardee, 53.75 for PCS and 75.25 for the third offeror. Even if PCS received the full amount of points available for the category in which its subcontractor was evaluated, PCS' composite score only increases to 71.50. Given the fact that PCS' proposed cost was only 1 percent more than the awardee's proposed cost (\$1,137,000 vs. \$1,149,864), we find no basis on which to conclude that the alleged miscalculation of PCS' proposed subcontractor denied PCS an award it otherwise would

have received. We conclude that PCS therefore was not prejudiced by the evaluation or by NASA's alleged failure to furnish PCS timely notice of the defect.

The protest is dismissed.

A handwritten signature in black ink, appearing to read 'R. Strong', written in a cursive style.

Robert M. Strong
Deputy Associate
General Counsel